

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

<b>STATE OF DELAWARE</b>	)	ID. No. 1209003136C
	)	In and for Kent County
v.	)	
	)	RK12-11-0356-01
<b>ORLANDO INGRAM,</b>	)	RK12-11-0357-01
	)	Robbery 1 <sup>st</sup> (F)
Defendant.	)	RK12-11-0361-01
	)	PFDCF (F)
	)	RK12-11-0368-01
	)	Conspiracy 2 <sup>nd</sup> (F)
	)	RK12-11-0083
	)	Resist Arrest (M)

**COMMISSIONER'S REPORT AND RECOMMENDATION**

**Upon Defendant's Motion for Postconviction Relief  
Pursuant to Superior Court Criminal Rule 61**

Marie O. Graham, Esquire, Deputy Attorney General, Department of Justice, for the State of Delaware.

Natalie S. Woloshin, Esquire, Woloshin, Lynch & Associates, P.A., Wilmington, Delaware for Defendant.

FREUD, Commissioner  
June 28, 2018

The defendant, Orlando Ingram<sup>1</sup> (“Ingram”), was initially indicted in a 48 count

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<sup>1</sup> A/K/A “Arlando” Ingram

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indictment in December 2012 for his alleged participation in a veritable Robbery crime wave, involving multiple armed robberies of small businesses in the Dover, Delaware area. The robberies occurred in August and September 2012. Following the final robbery which occurred on September 4, 2012, Ingram's co-defendants were apprehended while fleeing the scene. Although the police saw three suspects fleeing the scene Ingram was able to avoid capture at the time. Following the arrest of Ingram's co-defendants, the day of the Robbery, one of the suspects told the police that Ingram was the third suspect who had gotten away from the police. Additionally the police recovered an unopened pack of Newport cigarettes, which the victims had told the police had been taken by the robbers, along the path that the third suspect had fled. After a forensic exam Ingram's fingerprints were identified on the Newport cigarette pack. Based on these facts the police developed Ingram as the final suspect in the Robbery spree. Armed with a search warrant the Dover Police arrested Ingram on September 27, 2012 after Ingram resisted arrest and was found with a loaded firearm similar to the one the victims identified as being used in the robbery. Included in the 48 count indictment were seven counts of Possession of a Firearm by a Person Prohibited. Ingram's counsel filed a written Motion to Sever these charges from the remaining counts. The Court granted the motion prior to trial.

On the morning that trial was set to begin, November 18, 2013, on the remaining 41 counts, the State made an oral motion to sever out the counts related to the September 4, 2012 robbery and the counts relating to Ingram's September 27, 2012 arrest on the robbery charges and to proceed to trial only on those counts and

not the remaining robbery counts.<sup>2</sup>

The Court and counsel discussed the motion and Ingram's counsel stated that he did not oppose the motion and that Ingram has the same position as he did based upon the fact that Ingram was eligible to be sentenced as an habitual offender and would be subject to a very lengthy mandatory sentence if found guilty of only one of the Robbery counts. Trial Counsel felt it would be better for the jury not to be bombarded with the testimony that Ingram was allegedly involved in multiple robberies in one trial.<sup>3</sup> The Court also asked Ingram if he agreed and he replied that he did.<sup>4</sup>

Next the Court heard testimony on Ingram's Motion to Suppress evidence from his arrest on September 27, 2012. Following the hearing the Court denied the motion and the trial immediately commenced. The jury found Ingram guilty as charged of two counts of Robbery in the First Degree, 11 *Del. C.* § 832; one count of Possession of a Firearm During the Commission of a Felony, 11 *Del. C.* § 1447A; one count of Conspiracy in the Second Degree, 11 *Del. C.* § 512; and one count of Resisting Arrest, 11 *Del. C.* § 1257.

On December 5, 2013 the State moved to declare Ingram an Habitual Offender. After several continuances of his sentencing Ingram was declared an habitual offender pursuant to 11 *Del. C.* § 4214(a) on January 30, 2014 and sentenced to a

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<sup>2</sup> *State v. Ingram*, Del. Super., ID No. 1209003136C (Nov. 18, 2013) tr. at 4-10.

<sup>3</sup> *Id.*, tr. at 6 - 9.

<sup>4</sup> *Id.*, tr. at 9-10.

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total sentence of seventy-five years Level V incarceration followed by probation. In May 2014 Ingram was tried on one count of Possession of a Firearm by a Person Prohibited relating to his arrest on September 27, 2012. And was found guilty and given twenty-five years incarceration. Following the sentencing the State entered nolle prosequis on the remaining Robbery related counts, without prejudice due to Ingram's having received a total of 100 years in jail following the two trials.

A timely Notice of Appeal to the Delaware Supreme Court was filed. Ingram's counsel filed a brief and motion to withdraw pursuant to Supreme Court Rule 26(c). In the motion to withdraw, appellate counsel represented that he conducted a conscientious review of the record and concluded that no meritorious issues existed. By letter, counsel informed Ingram of the provisions of Rule 26(c) and attached a copy of the motion to withdraw and accompanying brief. Ingram was informed of his right to supplement his attorney's presentation. Ingram, *pro se*, raised two issues for appeal for the Supreme Court to consider, which the Supreme Court classified as follows:

(11) In his written submission, Ingram argues that the Superior Court erred when admitting the gun and the cigarette pack into evidence at trial. Ingram contends that the State failed to sufficiently authenticate the gun by demonstrating that the gun recovered on September 27, 2012 was associated with the robbery on September 4, 2012. Ingram contends that the State failed to prove that the pack of Newports recovered from the bike path was one

of those stolen from the Family Dollar store.<sup>5</sup>

The Supreme Court granted the State's motion to affirm as to all of Ingram's claims.<sup>6</sup> Next, *pro se*, Ingram filed a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 on May 7, 2015 and a Motion for Appointment of Counsel which the Court granted. Subsequently, Natalie S. Woloshin, Esquire ("Appointed Counsel") was appointed to represent Ingram in his motion. She filed an amended motion for Postconviction relief alleging ineffective assistance of counsel on March 16, 2017 and requested an evidentiary hearing. My review of the facts and the law lead me to conclude that an evidentiary hearing is unnecessary in this case. Ingram's Trial Counsel and the State responded to the amended motion for postconviction relief and Appointed Counsel filed a response.

### **FACTS**

The following is a summary of the facts as noted by the Supreme Court in its opinion on Ingram's direct appeal:

(1) On September 4, 2012, three black males - two adults and one teenager - robbed the Baycourt Plaza Family Dollar store in Dover, Delaware. One adult wore a black ski mask. The other adult wore a t-shirt tied around the lower half of his face and had a gun. The teenager did not wear a mask.

(2) Two female employees, a store cashier and a

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<sup>5</sup> *Ingram v. State*, 2014 WL 7465977, at \*2. (Dec. 30, 2014 Del. Supr.).

<sup>6</sup> *Ingram*, at \*3.

manager, were in the store at the time of the robbery. The gunman ordered the cashier to open the cash registers. When she could not, the man in the black ski mask ordered her to the floor, and the gunman ordered the manager to open the cash registers. Meanwhile, the teenage boy removed packs of Newport cigarettes and Swisher cigars from a cabinet behind the front counter. When leaving the store, the three suspects fled down a nearby bike path, taking with them the cash from the cash registers, nearly three dozen packs of Newport, and several cigars. The store manager immediately called 911.

(3) Within minutes of the 911 dispatch, Dover Police apprehended two suspects in the area of the bike path. The police also recovered from the bike path a black ski mask, a pack of unopened Newports, two one dollar bills, and a tee-shirt. When the items were processed for fingerprints, a thumbprint located on the cigarette pack was matched to the appellant, Orlando Ingram.

(4) The police obtained an arrest warrant for Ingram and arrested him on September 27, 2012, after tracking him to his sister's apartment in Dover. Before executing the arrest warrant, the police made contact with Ingram's sister, Lutricia Ingram, who confirmed that Ingram was inside her apartment. Ingram put up a fight when the police entered the apartment to arrest him. When struggling with the police, Ingram made repeated attempts to reach for a gun under the couch. After Ingram was subdued and taken into custody, Lutricia Ingram gave the

police written consent to search the apartment.

(5) Ingram was indicted on two counts of Robbery in the First Degree, one count of Possession of a Firearm During the Commission of a Felony (“PFDCF”), one count of Conspiracy in the Second Degree in connection with the robbery of the Family Dollar store on September 4, 2012. Ingram was also charged with one count of Resisting Arrest in connection with his arrest on September 27, 2012.

(6) Prior to trial, Ingram’s defense counsel moved to suppress the evidence seized from Lutricia Ingram’s apartment on September 27, 2012. After a suppression hearing, the Superior Court denied the motion, ruling that the search was valid because the police had an arrest warrant for Ingram, and because Lutricia Ingram had signed a written consent to the search.

(7) Ingram was tried before a Superior court jury. At the close of the State’s presentation, Ingram’s defense counsel moved for a judgment of acquittal, claiming that the State had presented insufficient evidence to prove beyond a reasonable doubt that Ingram had participated in the robbery on September 4, 2012. The Superior Court denied the motion, finding that there was sufficient evidence to send the case to the jury for decision.<sup>7</sup>

Additionally, the trial testimony showed that the initial reporting Dover police

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<sup>7</sup> *Ingram*, at \*1.

officer saw three suspects in an area behind the robbery location matching the description given by the victims. The officer saw one of the suspects carrying a white plastic bag resembling the bag the victims had told police the robbers had used to put the stolen cigarettes and money in. As the officer drove his police vehicle closer to the suspects they noticed his car and turned around to look at the police car at which time the three suspects began running away down a bike path to avoid capture. Two of the suspects were apprehended but neither had the bag or any of the stolen merchandise. The individual with the bag was able to elude capture but as noted by the Supreme Court an unopened pack of Newport cigarettes was found along the path the suspect had fled and had Ingram's fingerprints on it. Also found along the path was a discarded t-shirt which the third suspect with the gun had used to conceal his face during the robbery.<sup>8</sup>

### **INGRAM'S CONTENTIONS**

Ingram's Appointed Counsel filed an Amended Motion for Postconviction Relief pursuant to Superior Court Rule 61. She raises the following grounds for relief:

Ground one:	Trial Counsel was ineffective by failing to provide Mr. Ingram with effective representation during the pre-trial phase of the case in violation of Mr. Ingram's Sixth and Fourteenth Amendment rights under the United States Constitution and his rights
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<sup>8</sup> *State v. Ingram*, Del. Super., ID No. 1209003136C (Nov. 18, 2013) tr. at 68-71, 76, 81-83, 88.



under Article I, §§ 4, 7, and 9 of the Delaware Constitution by failing to file a motion to sever the Resisting Arrest charge.

Ground two: Trial Counsel failed to provide Mr. Ingram with effective representation throughout his trial in violation of Mr. Ingram's Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution, as well as his Delaware Constitutional rights under Article I, §§ 4, 7, and 11.

A. Trial Counsel failed to object to testimony throughout the trial.

B. Trial Counsel failed to oppose a flight instruction.

### **DISCUSSION**

Under Delaware law, this Court must first determine whether Ingram has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of his postconviction relief claim.<sup>9</sup> Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.<sup>10</sup> Ingram's initial *pro se* motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply.

Ingram's grounds for relief were not asserted in the proceedings leading to

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<sup>9</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

<sup>10</sup> Super. Ct. Crim. R. 61(i)(1).

judgment of conviction therefore is barred unless he can demonstrate: (1) cause for the procedural fault and (2) prejudice from a violation of the movant's rights.<sup>11</sup> All the bars to relief are inapplicable to a jurisdictional challenge or to a colorable claim of miscarriage of justice stemming from a constitutional violation that "undermine[s] the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."<sup>12</sup>

Ingram's claims are based on allegations of ineffective assistance of counsel. This type of claim is not normally subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Ingram, allege ineffective assistance of counsel in order to overcome the procedural default.

However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards.<sup>13</sup> The United States Supreme Court has held that:

[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance." Ineffective assistance of counsel, then, is

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<sup>11</sup> Super. Ct. Crim. R. 61(i)(3).

<sup>12</sup> Super. Ct. Crim. R. 61(i)(5).

<sup>13</sup> See *State v. Gattis*, 1995 WL 790961, at \*3 (Del. Super. Dec. 28, 1995), *aff'd*, 697 A.2d 1174 (Del. 1997).

cause for a procedural default.<sup>14</sup>

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two-part analysis enunciated in *Strickland v. Washington*<sup>15</sup> and adopted by the Delaware Supreme Court in *Albury v. State*.<sup>16</sup>

The *Strickland* test requires the movant to show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.<sup>17</sup> Second, under *Strickland*, the movant “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,” that is, actual prejudice.<sup>18</sup> In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.<sup>19</sup>

Generally, a claim for ineffective assistance of counsel fails unless both prongs

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<sup>14</sup> *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (second alteration in original) (citation omitted).

<sup>15</sup> 466 U.S. 668 (1984).

<sup>16</sup> 551 A.2d 53, 58 (Del. 1988).

<sup>17</sup> *Strickland*, 466 U.S. at 687-88; *see also Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

<sup>18</sup> *Strickland*, 466 U.S. at 694; *see also Dawson*, 673 A.2d at 1190.

<sup>19</sup> *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

of the test have been established.<sup>20</sup> However, the showing of prejudice is so central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."<sup>21</sup> "In other words, if the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone."<sup>22</sup> "Furthermore, the defendant must rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the distorting effects of hindsight when viewing that representation .""<sup>23</sup>

In the case at bar, Ingram raise three claims of ineffective assistance of counsel. He claims that his counsel was ineffective for not filing a motion to sever the Resisting Arrest charge, for failing to object to testimony and for not objecting to a flight instruction. After a complete review of the record I conclude that Trial Counsel represented Ingram effectively. As to Ingram's claim that it was ineffective not to request that the Resisting Arrest charge be severed, the record is clear that Trial Counsel and Ingram had decided to go forward to trial on the September 4, 2012 Robbery counts and the September 27, 2012 Resisting Arrest charge. Furthermore,

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<sup>20</sup> *Strickland*, 466 U.S. at 687.

<sup>21</sup> *Id.* at 697.

<sup>22</sup> *Gattis*, 1995 WL 790961, at \*4.

<sup>23</sup> *Id.* (quoting *Strickland*, 466 U.S. at 689).

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I find that even if a motion to sever the Resisting arrest charge had been made there was, as noted by the State, sufficient evidentiary value in the testimony concerning Ingram's actions during his arrest and the finding of a loaded weapon that matched the description of the weapon used in the Robbery, that the evidence would have been admitted at the trial because it was relevant. Furthermore, I find that there was no prejudice due to the strong evidence linking Ingram to the crime. His fingerprints on the cigarette pack found along the path the suspect with the contraband fled is compelling to say the least. Consequently, the testimony concerning the arrest was relevant and outweighed any potential prejudice to Ingram. The charges were properly joined.

I further find Trial Counsel was not ineffective for failing to object to various lines of questioning. As noted in the amended brief, Trial Counsel, during trial chose not to object due to the tactical reasons. Under the circumstances of the case I find his actions reasonable. Furthermore, I do not find that the lack of objection prejudiced Ingram given the weight of evidence against him.

Finally turning to the allegation that Trial Counsel should have opposed a flight instruction, I find this ground meritless. The record clearly shows that there was sufficient evidence presented during the trial to warrant a flight instruction. Consequently there was no prejudice to Ingram.

### **CONCLUSION**

In reviewing the record in this case, it is clear that Ingram has failed to avoid the procedural bars of Superior Court Criminal Rule 61(i). Consequently, I recommend that Ingram's amended postconviction motion be denied as procedurally

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barred by Rule 61(i) for failure to prove cause and prejudice, and as meritless.

\_\_\_\_\_/s/ Andrea M. Freud

Commissioner

AMF/dsc

cc: Prothonotary